

1989

# First Federal Savings and Loan Association of Salt Lake City v. Gump and Ayers Real Estate, Inc. and Air Terminal Gifts, Inc. : Reply to Brief in Opposition

Utah Supreme Court

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UTAH SUPREME COURT  
BRIEF

890166

IN THE SUPREME COURT OF THE  
STATE OF UTAH

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FIRST FEDERAL SAVINGS & LOAN	)	
ASSOCIATION OF SALT LAKE CITY,	)	Cert No. 890166
	)	
Plaintiff-Appellant,	)	Category No. 13
vs.	)	
	)	Court of Appeals Case No.
GUMP & AYERS REAL ESTATE, INC.	)	880331-CA
and <u>AIR TERMINAL GIFTS, INC.</u> ,	)	
Defendant-Respondent-Petitioner.)	)	

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REPLY BRIEF OF PETITIONER  
AIR TERMINAL GIFTS, INC. TO  
FIRST FEDERAL'S BRIEF IN OPPOSITION  
TO ISSUANCE OF WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE  
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ASSOCIATION OF SALT LAKE CITY,	)	Cert No. 890166
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and <u>AIR TERMINAL GIFTS, INC.</u> ,	)	
	)	
Defendant-Respondent-Petitioner.)	)	

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Reply Brief of Petitioner Air Terminal Gifts, Inc.  
to First Federal's Brief in Opposition to Issuance of Writ of  
Certiorari.

ARGUMENT

Both First Federal and the Court of Appeals completely ignore the trial court's undisputed findings of fact which form the basis for the trial court's conclusions of law. The applicable findings, with added pertinent underlining, are:

2. On that date Air Terminal paid \$75,000 in cash and executed a thirteen page Purchase and Security Agreement ("purchase agreement") and a contemporaneous and integrated companion promissory note payable in three installments in the total principal amount of \$125,000 plus interest.

3. At the time the purchase agreement and note were signed, representatives of Gump & Ayers told Air Terminal that the purchase agreement and note were companion parts of the same transaction and protected Air Terminal from separate suit on the note.

7. The purchase agreement and note were executed at the same time as companion parts of a contemporaneous, integrated, package transaction.

11. On June 27, 1984 in connection with the \$100,000 loan Gump & Ayers assigned the Air Terminal purchase agreement and note as a package to First Federal who was the author of and typed on the bottom of the Air Terminal note the following words of assignment:

Sunayers hereby assigns, with recourse, all of its right, title and interest in the above promissory note and the agreement securing it to First Federal Savings and Loan Assn. of Salt Lake City,

Sunayers Limited Partnership  
By Gump and Ayers  
Real Estate, Inc.  
Its General Partner

12. The Gump & Ayers' note for \$100,000 dated June 27, 1984 was prepared by First Federal and links together the Air Terminal note and purchase agreement by the following statement which is typed on the bottom of the Gump & Ayers' note:

The indebtedness evidenced by this note is secured by a Promissory Note dated June 5, 1984 and a Security Agreement of even date. (Included in Appendix to Petition.)

Certainly, the Air Terminal purchase agreement and note do not involve a conditional sale, as is suggested by First Federal.

In addition, both First Federal and the Court of Appeals make the unsupported assumption that the meaning of the "Morse Shortfall" was that Gump & Ayers was repaid a debt and that such repayment was not a benefit to Gump & Ayers. There is no evidence to support such an assumption. What is indisputable is that the trial court's pertinent findings resolving applicable questions of fact and supporting the trial court's conclusions may not be disregarded under the circumstances of this case. See Kimball v. Campbell, 699 P.2d 714 (Utah 1985), which holds that the appellate court will not disturb findings and judgment based on proper evidence as to the parties' intentions.

In its argument that the Air Terminal note is negotiable,

First Federal wrongly assumes and takes for granted the proposition that First Federal is a holder in due course. First Federal's assumption begs the question because to make such argument First Federal must completely ignore the undisputed facts of notice and knowledge found by the trial court against First Federal.

First Federal makes the statement on page 8 of its brief in opposition that the question whether Gump & Ayers assigned the Air Terminal note to First Federal as security for Gump & Ayers' own debt was not previously raised. First Federal's statement is clearly in error. On page 18 of Air Terminal's appellate brief, Air Terminal makes the following statement:

. . . Clearly the Gump & Ayers' note was solely Gump & Ayers' debt and was at least partially a transaction for Gump & Ayers' benefit. . . .

In addition, Air Terminal has at every opportunity cited and underlined §70A-3-304(2) which conclusively ascribes notice to First Federal under the facts of this case. Moreover, the Court of Appeals ignores the applicability of notice to First Federal under §70A-3-119(1).

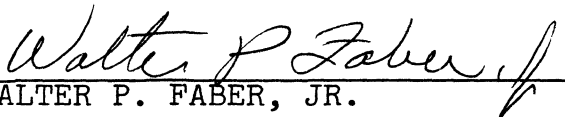
The remainder of First Federal's argument is addressed in Air Terminal's petition.

#### CONCLUSION

Neither First Federal nor the Court of Appeals is entitled to ignore the applicable findings of the trial court and neither is entitled to make gratuitous assumptions unsupported by the established facts or the plain meaning of the applicable statutes.

It is submitted that there are manifest and compelling reasons in this case for the issuance of the writ of certiorari as stated in Air Terminal's petition.

Respectfully submitted this 11th day of May, 1989.

  
WALTER P. FABER, JR.

CERTIFICATE OF MAILING

I hereby certify that I mailed four copies of the foregoing to John W. Lowe, 50 West 300 South, Fourth Floor, Salt Lake City, UT 84101, postage prepaid, this 12<sup>th</sup> day of May, 1989.

